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September 14, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: D.T.E. 04-33 - Petition of Verizon New England Inc. for Arbitration

Dear Ms. Cottrell:

Enclosed for filing in the above-referenced matter is Verizon Massachusetts' Response to CLEC Motions for Reconsideration and/or Clarification.

Thank you for your assistance in this matter.

Sincerely,

Alexander W. Moore

cc: Service List

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

RESPONSE OF VERIZON MASSACHUSETTS TO CLEC MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION

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RESPONSE OF VERIZON MASSACHUSETTS TO CLEC MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION

Verizon Massachusetts ("Verizon MA") hereby responds to the motions of AT&T, Conversent, XO Communications, CTC Communications and Lightship Telecom for reconsideration and/or clarification of the Arbitration Order ("Order") the Department issued in this proceeding on July 14, 2005. None of the issues raised by the CLECs merit reconsideration by the Department, either because the Department's original decision on a given issue was correct and fully supported by applicable law or, as noted below, there is no actual dispute between Verizon MA and the CLECs on a given issue. The Department should deny the CLECs' motions. Verizon MA addresses below each issue raised by the CLECs.

ARGUMENT

1. The Department Did Not Err in Applying the FCC's DS1 Transport Cap Rule as Written.

In the *Triennial Review Remand Order*,[1] the FCC adopted Rule 51.319(e)(2)(ii)(B), which states:

> Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

The Department applied this rule exactly as written – that is, to impose a cap of 10 DS1 circuits on each route where unbundled DS1 transport remains available. It rejected CLEC arguments that the UNE DS1 cap applies only on routes where DS3 unbundling is not required. The Department relied on basic principles of statutory construction to find that there was no need to consider the CLECs' contention that a statement in the *TRRO* was inconsistent with the rule's unqualified cap: "there is no ambiguity of the rule itself, which contains no limitation on its applicability based on the availability of unbundled DS3 transport." Order at 77, citing *United States v. Lachman*, 387 F. 3d 42, 50 (1st Cir. 2004).

CTC, Lightship and Conversent claim that the Department committed legal error in following the plain meaning of rule 51.319(e)(2)(ii)(B). They contend that the Department should instead have relied on allegedly inconsistent, "interpretive text" in the *TRRO* to read into the rule the limitation they urge. CTC and Lightship even claim that by applying "FCC rules exactly as they had been written by the FCC," the Department

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[1] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

neglected its purported duty to "consider the merits of the issue independently" and decide for itself what the scope of unbundling under section 251 should be. CTC/Lightship Motion at 5. Their claims are without merit and should be rejected.

To the contrary, the Department had no choice but to apply the UNE DS1 cap rule just as the FCC drafted it. The Department cannot ignore basic principles of statutory construction, as well as substantive law, to conclude that the FCC's DS1 transport cap is the wrong policy for Massachusetts. And even if the Department had occasion to look beyond the plain language of Rule 51.319(e)(2)(ii)(B) to the *TRRO* text, the discussion in the Order is consistent with the rule itself.

a. The Department Correctly Applied the Plain Meaning Rule.

The CLECs argue that the Department erred in applying the plain meaning of Rule 51.319(e)(2)(ii)(B) because it "categorically ignore[d]" the FCC's intent behind the rule. CTC/Lightship Motion at 3-4; Conversent's Motion at 1-3; 11-12. Although they admit the rule is unambiguous, they ask the Department to read into it language specifying that the UNE DS1 transport cap applies only on routes where DS3 transport need not be unbundled. CTC/Lightship Motion at 4. They ask the Department to make this rule modification based solely on the FCC's comment in the *TRRO* that "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits." *TRRO*, ¶ 128. According to CTC, Lightship, and Conversent, the normal rules of statutory construction do not apply to FCC regulations—in particular, "[t]he rule of statutory construction that requires the existence of an ambiguity in the statutory language before resort may be made to

legislative history or other interpretive text simply is not a feature of FCC jurisprudence." Conversent Motion at 2; *see also* CTC/Lightship Motion at 4-5.

The CLECs are wrong. There is no question that the "[t]he principles or rules of statutory construction apply to administrative regulations," including FCC regulations. *See, e.g.*, 2 Am. Jur. 2d Administrative Law, § 245; *Atlas Telephone Co. et al. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005); *M. Kraus & Bros. v. U.S.*, 327 U.S. 614, 66 S. Ct. 705, 90 L.Ed. 894 (1946). "As a rule, where the language of a statute is clear and unambiguous, its clear meaning may not be evaded by an administrative body or a court under the guise of construction," and the language must be given effect "without resort to extrinsic guides to construction." *See, e.g.*, 73 Am. Jur. 2d Statutes § 113 (footnotes and case citations omitted); *Commonwealth v. Dale D.*, 431 Mass. 757; 730 N.E. 2d 278 (2000). "If a regulation is unambiguous, intent can be determined from the language alone." 2 Am. Jur. Administrative Law § 246. "[T]he legislative history of a statute may not compel a construction at variance with its plain words." 73 Am. Jr. 2d Statutes § 86.

The Department correctly applied these principles, finding no need to look to the FCC's discussion of the rule to determine intent, because Rule 51.319(e)(2)(ii)(B) is unambiguous. Order at 77. Although Conversent cites an early New York Public Service Commission tariff order imposing the restriction the CLECs advocate, that incorrect decision is the outlier, and it did not address the statutory construction issue. Rulings elsewhere have used the same logic the Department did to reject the same arguments the CLECs make here. The Texas Commission, for example, found that: "Assuming ¶ 128 could be interpreted to permit requesting carriers to obtain more than

10 DS1 dedicated transport circuits on certain routes under certain conditions, the rule of statutory construction dictates that ¶ 128 cannot prevail over the plain meaning of FCC's Rule §51.319(e)(2)(ii)(B)."[2] The Rhode Island Commission, likewise, determined that any lack of clarity in the *TRRO* itself "does not diminish the validity or clarity of the FCC's UNE Rules" imposing a 10-DS1 circuit cap on routes where DS1 transport is unbundled.[3] And the arbitrator in Verizon's *Triennial Review Order ("TRO")* arbitration in the District of Columbia found that "the plain language of the rules adopted by the FCC" precluded application of the same limitation the CLECs seek here.[4]

The *Lachman* case the Department cited to support its decision applying the plain meaning of Rule 51.319(e)(2)(ii)(B) is not "inapposite," as Conversent argues. Conversent Motion at 9-10. This case (as well as the U.S. Supreme Court and other federal court precedent *Lachman* cites) reiterates the longstanding, universally applied principle that an unambiguous regulation must be applied as written. Indeed, *Lachman* expressly forbids consideration of "agency interpretations" to determine the meaning of a regulation when it is unambiguous. *U.S. v. Lachman, et al.*, 387 F.3d 42, 54 (1st Cir. 2004). Contrary to Conversent's misreading of *Lachman*, the case makes clear that this principle applies whether the agency interpretation is informal and unpublished or whether it is reflected in public documents. *Id.*

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2 Order No. 45 Resolving Remaining Contract Disputes, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821. at 8-9 (Aug. 5, 2005) ("*Texas Order*"), approved by the Texas P.U.C. in Order Approving Interconnection Agreements, (Aug. 29, 2005).

3 Report and Order, *Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Docket 3662, at 14 (July 28, 2005).

4 Recommended Decision, *Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(b) of the Telecomm. Act of 1996*, TAC-19, ¶ 73 (Sept. 6, 2005) ("DC Recommended Decision").

None of the cases the CLECs cite support their made-up theory that text of an agency order can be used to contradict the clear terms of the agency's rule. Indeed, in the *SBC* case Conversent attaches to its Motion, the Third Circuit *rejected* SBC's argument that discussion in the FCC's *Local Competition Order* required a CLEC to meet both a geographic area test and a "functional equivalency" test to obtain the tandem reciprocal compensation rate, even though the latter test was not explicitly stated in the FCC's rule. *See SBC v. Fed. Comm. Comm'n*, No. 03-4311, slip op. (3d Cir. 2005). Neither the Court nor the FCC relied on the FCC's Order to read a functional equivalency test into the rule, as Conversent suggests. Conversent Motion at 5. Rather, the Court observed that the *Local Competition Order* was *consistent with* the rule at issue, and accepted the FCC's position that a CLEC could meet the geographic area test by proving that its switch was functionally equivalent to an incumbent's tandem switch. *SBC*, slip. op. at 30-31.

There is, likewise, nothing in *Verizon v. FCC* that excepts FCC regulations from the plain meaning rule. Conversent says the Supreme Court in that case upheld the FCC's combinations rules by reading them together with the FCC's interpretive text, without first finding any ambiguity in the combinations rules themselves. But the issue there was whether the FCC had the authority to adopt its combinations rules in the first instance – not whether the FCC had correctly construed or applied those rules. *See Verizon v. FCC*, 535 U.S. 467, 531-39 (2002). The fact that the Supreme Court considered FCC discussion of its combinations rules in upholding those rules is irrelevant to the statutory construction issue the CLECs raise here.

Finally, leaving aside the CLECs' mischaracterizations of the FCC Orders they cite, Verizon MA does not disagree with the CLECs' point that the FCC may impose

regulatory requirements by means of either rules or orders. *See* Conversent Motion at 6-9; CTC/Lightship Motion at 4. But that uncontroversial principle in no way supports the CLECs' new theory that text in an order may be read to override an unambiguous rule. The Department correctly understood that traditional rules of statutory construction apply to FCC regulations, so that "[t]he plain language of the rule must prevail over the claim of inconsistency" with the *TRRO*. Order at 77.

b. The Rule Is Not, in Any Event, Inconsistent with the TRRO.

Although the Department correctly determined that it had "no occasion to look to the FCC's discussion of the rule" capping UNE DS1 transport because the rule is unambiguous, it nevertheless observed that the statement the CLECs point to in the *TRRO* is "merely silent as to the applicability of the DS1 cap on routes where unbundled DS3 transport is available." Order at 77. This silence does not create any inconsistency with the rule. Indeed, after applying the plain meaning rule, the Texas Commission went on to explain that, in any event, "¶ 128 is not intended to be restrictive such that the 10 DS1 limit only applies to routes where DS3 dedicated transport is not available, as the CLEC Coalition asserts." This paragraph is instead "intended to emphasize and clarify that a limit of 10 DS1 dedicated transport circuits also applies to those routines where unbundled DS1 dedicated transport is available and DS3 unbundled transport is not."[5] The Texas Commission thus correctly found "no conflict between ¶ 128 and the FCC's Rule §51.319(e)(2)(ii)(B)." *Id.* at 11.

The District of Columbia Arbitrator, likewise, agreed with Verizon that the exception to the cap the CLECs urge makes no sense, because it would be inconsistent

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5 *Texas Order*, at 9 (emphasis in original).

with the FCC's determination as to the appropriate cross-over point for the conversion of multiple DS1s to a single DS3 – that is, if a carrier has more than 10 DS1s on a route, it should be deploying a DS3 instead.[6] If a carrier has access to unbundled DS3 transport on a route, the carrier can purchase such unbundled access, but it may not evade the 10 DS1 cap. Likewise, if a carrier aggregates enough traffic from unbundled DS1s at a particular wire center to warrant deployment of more than 10 DS1s for transport from that office, the carrier should migrate the traffic to a DS3 (unbundled if available, special access or alternative facilities if not).

The Department correctly understood that it must apply the plain meaning of Rule §51.319(e)(2)(ii)(B) without regard to any claimed inconsistency with paragraph 128 of the *TRRO*. But there is, in any event, no such inconsistency. As the Department has already suggested, paragraph 128 is best read to identify only *one circumstance* in which the DS1 UNE transport cap applies, not to specify its application *only* on such routes.

c. Application of the FCC's UNE DS1 Cap Is Not Optional.

CTC and Lightship argue that Congress did not intend for states to apply "FCC rules exactly as they had been written," because section 252 requires states to consider whether interconnection agreements "meet the requirements of section 251, including the regulations prescribed by the FCC." CTC/Lightship Motion at 4-5 and n. 9, quoting 47 U.S.C. § 252(e)(2)(B). The CLECs thus conclude that the Department would be "failing its obligations under the Act" if it does not "retract its application of a 'plain meaning' rule" and make its own, independent analysis of Verizon MA's section 251 obligations. CTC/Lightship Motion at 4-5.

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[6] DC Recommended Decision, ¶ 73 ("if a CLEC wishes to purchase transport capacity beyond 10 DS1s, it can purchase a DS3, which will be offered on an unbundled basis along the very routes for which the [CLECs] wish the cap to be lifted.").

The CLECs' logic is exactly backwards. Obviously, the arbitrated contracts will not "meet...the regulations prescribed by the FCC" if they do not reflect the FCC's regulations as the FCC drafted them. So the Department cannot meet its section 252 obligation if it reads into the FCC's regulations the modification the CLECs urge.

Moreover, the Department has already found that it has no authority to contradict federal unbundling rules: "Where the FCC has...ruled that network elements are not required to be unbundled, state mandated unbundling of those elements would be contrary to federal regulation."[7] Rule §51.319(e)(2)(ii)(B) plainly states that ILECs are not required to unbundle more than 10 UNE DS1 circuits for a requesting CLEC on any route where impairment has been found for DS1 transport. If the Department adopted the rule modification the CLECs urge, the 10-DS1 cap would be lifted on all routes, except for those where DS3 transport is no longer available—that is, the Department would be mandating unbundling where the FCC has decided against it. This action would "substantially prevent implementation of...the federal unbundling rules," in violation of 47 U.S.C. § 251(d)(3). Where the FCC has made a deliberate determination that limiting unbundling is consistent with the pro-competitive goals of the 1996 Act – as it has done here through imposition of the DS1 cap – the Department has no authority to express a different "policy preference" (CTC/Lightship Motion at 4) by refusing to apply the plain language of the FCC's rule.[8]

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[7] Order at 44. *See also* D.T.E. 03-60 and 04-73, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 22 (December 15, 2004) ("Where the FCC has found affirmatively that CLECs are 'not impaired' and that ILECs are therefore not obligated to provide the network elements as UNEs under Section 251, a contrary finding of impairment would conflict with federal regulation.")

[8] *See, e.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 195 (2003) ("TRO"), vacated in part and remanded, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), cert. denied, *NARUC v. United States*

Finally, even if the Department could lawfully take on the task of modifying the FCC's DS1 cap rule (and it cannot), there would be no reason to do so, because CTC and a number of other CLECs have already asked the FCC to eliminate or modify the 10 DS1 transport cap.[9] The FCC is the only appropriate forum to consider the CLECs' policy arguments.

2. The Department Did Not Err in Applying the FCC's FTTH and FTTC Rules as Written.

The Department rejected the CLECs' arguments that the FCC intended to limit unbundling relief for fiber-to-the-premises ("FTTP"), fiber-to-the-home ("FTTH"), and fiber-to-the-curb ("FTTC") to just mass-market customers. In doing so, the Department relied on the plain language of the FCC's FTTH and FTTC rules. The Department quoted the FCC's FTTH loop definition:

> A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE).

Order at 175, quoting 47 C.F.R. § 51.319(a)(3)(iii) (emphasis added by the Department).

The Department also recited the FCC's FTTC definition:

> A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises, or, in the case of

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Telecom Ass'n, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004); Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecomm. Inc. Request for Declaratory Ruling*, 20 FCC Rcd 6830, ¶¶ 17, 25-26 (2005).

9 *See* Petition for Reconsideration of CTC Comm. Corp., Gillette Global Network, Inc. d/b/a/ Eureka Networks, Globalcom, Inc., Lightwave Comm., LLC, McLeod USA, Inc., MPower Comm. Corp., PacWest Telecomm, Inc., TDS MetroCom, LLC, and US LEC Corp., filed March 28, 2005, in the FCC's *TRRO* proceeding (WC Docket No. WC 04-313 and CC Docket No. 01-338), at 23.

> predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.

Order at 176, quoting 47 C.F.R. § 51.319(a)(3)(i)(B) (emphasis added by the Department).

In addition, the Department pointed out that the FCC's substantive rules limiting unbundling relief for new fiber builds and overbuilds do not distinguish between types of customers. Order at 176. The new builds rule reads:

> An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

47 C.F.R. § 51.319(a)(3)(ii) (emphasis added).

The overbuilds rule, likewise, provides that "[a]n incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility," except that the ILEC must maintain the existing copper loop connected to "the *particular customer premises*" unless the LEC retires the loop. 47 C.F.R. § 51.319(a)(3)(iii) (emphasis added).

The Department applied these rules just as the FCC drafted them. It correctly found that the FTTH and FTTC rules all refer to "customer premises," without limiting the premises to residential units; thus, the FCC did not restrict unbundling relief to only the mass market. Order at 176.

The CLECs nevertheless ask the Department to read the "customer premises" references in the FCC's rules as "residential customer premises." As a fallback position to achieve the same objective of distinguishing between mass-market and enterprise customers, CTC and Lightship ask the Department to read every instance of "loop" in the fiber unbundling rules as "DS0 loop," thus denying unbundling relief for DS1 and DS3 loops.[10] CTC, Lightship and Conversent allege that the Department committed legal error in applying the FTTH and FTTC rules based on the same analysis they did with respect to the DS1 cap ruling – that is, the plain meaning rule does not apply to FCC regulations, so the Department must disregard unambiguous rule language and instead rely on alleged FCC intent reflected in the text of FCC orders. CTC Lightship Motion at 3-6; Conversent Motion at 2-11; 12-15. This analysis is just as wrong as it was with respect to the DS1 cap decision, for the same reasons Verizon MA explained in part 1, above.

AT&T, at least, recognizes that "[i]nterpretation of regulations is no different" from interpretation of statutes, so the usual canons of statutory construction apply to FCC rules. AT&T Motion at 12. AT&T is thus constrained to find some ambiguity in the FCC's FTTH and FTTC rules before it can claim that they don't really mean what they say. In this regard, AT&T argues that the FCC's use of the words "residential" and "dwelling" in the FTTC and FTTH definitions makes the rules ambiguous. Lacking any

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[10] *See* CTC/Lightship Motion at 6-9. CTC and Lightship call this position a request for clarification or, in the alternative, reconsideration. It is clearly a reconsideration request, because the Department explicitly declined to distinguish between customer types in implementing the FCC's unambiguous fiber unbundling rules. *See* Order at 177, citing *TRO*, ¶ 210. In any event, neither CTC nor Lightship nor any other party in the arbitration proposed language limiting fiber unbundling relief to just DS0 loops, so it is improper for these CLECs to raise this issue for the first time on reconsideration. The Department should reject CTC's and Lightship's fallback proposal out of hand for this reason alone.

credible explanation to support this claimed ambiguity, AT&T makes its point mainly by bolding the words "residential" and "dwelling" in the rules. AT&T Motion at 9.

This tack is unconvincing. The FCC's reference to "residential multiple dwelling units" or "MDUs" as one type of "customer premises" (or "customer's premises") does not make the term "customer premises" (or "customer's premises") in the regulations ambiguous. "Customer premises" means just what it says – any type of customer premises, "without limiting the customer premise to a residential unit." Order at 176. Indeed, CTC and Lightship admit that the FCC's FTTH rules "do not expressly exclude enterprise customers."[11] CCC Initial Brief at 50. Because the plain language of the FCC's FTTC and FTTH definitions does not exclude enterprise customers (which CTC and Lightship define as customers taking DS1 or DS3 loops) – or for that matter, exclude DS1 or DS3 loops directly – the Department cannot read any such exclusions into the rules.

Moreover, CTC's and Lightship's contention that the FTTH and FTTC rules do not provide unbundling relief for DS1 and DS3 loops is inconsistent with those rules. Specifically, Rule 51.319(3)(ii)(c) provides that where an ILEC retires a copper loop after overbuilding it with fiber, the ILEC "shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service" over the fiber loop. That, of course, is the functional equivalent of a DS0 loop, so that the CTC/Lightship view of the rules as applying only to DS0 loops would allow no unbundling relief whatsoever in overbuild situations, in direct conflict with the FCC's rules that clearly provide for such relief.

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[11] CCC Initial Brief at 50. Indeed, "predominantly residential MDUs" would, by definition, have one or more businesses in them.

Because the FCC's FTTC and FTTH rules are unambiguous, there is no need to look beyond the rules themselves to discern the FCC's intent. Nevertheless, the legislative history of these rules confirms the intent expressed in their plain language. As the Department already pointed out, the FCC ***replaced*** previous references to "residential" and "residential units" in its substantive fiber unbundling rules with the term, "customer premises."[12]

In its *FTTC Order Errata*, the FCC stated that, "in rule section 51.319(a)(3)(ii), titled 'New builds,' we replace the words 'a residential unit' with the words 'an end user's customer premises.'"[13] Thus, the current version of 47 C.F.R. § 51.319(a)(3)(ii) provides: "An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to *an end user's customer premises* that previously has not been served by any loop facility." *See id.* (emphasis added).

In its *TRO Errata*, the FCC likewise deleted the word "residential" that originally modified "end user's customer premises" in the FTTH definition.[14] It also replaced the term, "residential unit," with "end user's customer premises" in the new builds rule. *Id.*, ¶ 38. In short, the FCC was careful to delete from the rules any qualification limiting the scope of the relief to a particular market segment but chose instead the broad term "customer premises."

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12 Order at 176, citing Errata, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-388, FCC 04-248, ¶ 11 ("*FTTC Order Errata*") (Oct. 29, 2004) and Errata, FCC 03-227, ("*TRO Errata*"), ¶¶ 37-38 (Sept. 17, 2003).

13 *FTTC Order Errata,* ¶ 11.

14 *TRO Errata* ¶ 37.

The CLECs have no rebuttal to this critical point, so they just ignore it. There can be no more definitive proof that the FCC did *not* intend to restrict fiber unbundling relief to just the mass market than the FCC's deliberate *removal* of this mistaken restriction in the original version of the rules. The Department cannot now read this same restriction back into the rules, as the CLECs ask it to do. Indeed, as the Department pointed out in its Order, the FCC emphasized that while it "adopt[s] loops unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops *do not vary based on the customer to be served.*" *TRO*, ¶ 210, cited in Order at 177 (emphasis added).

Under the CLECs' reading of the FCC's rules, however, the FCC *did* establish fiber loop unbundling obligations and limitations that vary with the customer to be served *(i.e.*, mass-market or enterprise), but without reflecting that distinction in its rules, and without ever defining the boundary between so-called "mass-market" and "enterprise" customer classes, instead implicitly delegating this task to the states. As the Department recognized, this far-fetched interpretation of the FCC's rules means "the Department would be required to define the two customer classes in order to implement the FCC's rules." Order at 175. Therefore, aside from asking the Department to ignore the plain language of the rules, the CLECs would have it engage in exactly the kind of exercise that the *USTA II* Court invalidated. Under section 251(d)(2) of the Act, the *FCC* must determine which network elements must be unbundled; it cannot delegate to a state commission the determination of whether the impairment standard is satisfied. *See USTA II*, 359 F.3d at 565-68. In particular, the FCC cannot "let[] the states make crucial decisions regarding market definition and application of the FCC's general impairment

standard to the specific circumstances of those markets." *Id.* at 567. But that is just what the CLECs openly ask the Department to do: "In order to implement the broadband loop rules in accordance with Section 251and the TRO, the Department must delineate the point between the enterprise and mass markets and apply these rules only to the latter."[15] CCC Initial Brief at 50. Even if the FCC had asked it to (and it didn't), the Department could not lawfully undertake this market definition exercise to determine for itself the scope of fiber unbundling relief to be granted in Massachusetts.

The CLECs' arguments for modifying the FCC's unambiguous FTTH and FTTC rules are no more convincing on reconsideration than they were when the Department considered them the first time around. Nothing in the scattered references the CLECs once again extract from the FCC's discussion establishes that the FCC intended to promote broadband deployment *solely* to the mass market.[16] The Department cannot countermand the FCC's deliberate policy choice – reflected in its rules *and* legislative history – not to limit fiber unbundling relief to only residential units.

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15 CCC Initial Brief at 50. In the context of its fallback proposal to limit unbundling relief to DS0 loops, CTC and Lightship argue that "[w]herever the line is between the enterprise and mass market, the FCC has clearly held that a DS1 is on the enterprise side of it." CTC/Lightship Motion at 9, citing *TRRO* n. 625. This is not true. As noted, the FCC explicitly declined to draw lines between customer classes for purposes of its loop unbundling rules. *See TRO*, ¶ 210, cited in Order at 177. Footnote 625 of the *TRRO* simply notes that there is no need for the FCC to revisit the cross-over point between mass-market and enterprise *switching* because all local switching has been eliminated. Nothing in that footnote suggests that a distinction between mass-market and enterprise customers applies for purposes of implementing the FCC's fiber unbundling rules.

16 Aside from reiterating the text that they erroneously claim supports their argument to limit unbundling relief to the mass market, CTC and Lightship attempt to support their alternative mass-market/enterprise distinction between DS0 customers, on one hand, and DS1 and DS3 customers, on the other, with a partial quote from *TRO* footnote 956. In addition to the other problems with CTC's and Lightship's analysis, by its reference back to the *TRO*'s discussion of FTTH loops at paragraphs 273 *et seq.,* that note specifically suggests that FTTH DS1 loops will *not* remain available on an unbundled basis. There the FCC acknowledged the obvious, that a fiber loop, by its very nature, is not limited in bandwidth to a mere DS0 capacity: "FTTH loops are used almost entirely for providing broadband services (or broadband services in conjunction with narrowband services) at this time, and that carriers are not deploying such loops to provide narrowband services alone." *TRO* ¶ 274.

3. Verizon MA does not object to defining the term "commingling" in the amendment.

XO asks the Department to reconsider its decision that the Interconnection Agreement ("ICA") amendment need not define the term "commingling," Order at 90 n. 44, and asks that the amendment "incorporate the definition of 'commingling' added to the FCC's unbundling rules, at 47 C.F.R. § 51.5." XO Motion at 3. Verizon MA does not object to XO's request. Although the Department stated that there was no need to define certain terms in the ICA Amendment, Verizon MA believes that, since the purpose of the Amendment is to implement the FCC's *Triennial Review Order* and *Triennial Review Remand Order*, it is useful to include definitions in the Amendment for terms contained in the rules. Accordingly, Verizon MA proposes adding the following to the definitions section of the amendment: "Commingling. Shall have the meaning set forth in 47 C.F.R. 51.5. 'Commingle' means the act of Commingling."

4. There is no dispute that the Order is effective as of July 14, 2005, and is not delayed while the parties negotiate final amendment language. No clarification is necessary.

XO asserts that "Verizon has made clear that it does not intend to honor the July 14, 2005, effective date ordered by the Department to perform the functions necessary to effectuate commingling and routine network modifications." XO Motion at 6. XO alleges that the Department "must expressly preclude blatant efforts by Verizon" to delay implementing the Order's findings with respect to commingling and routine network modifications until the parties sign a compliance amendment. *Id.* XO's accusations are false, and there is no need to "clarify" the Order. Verizon MA acknowledges that the Order is effective as of July 14, 2005, and has never stated any intention of delaying the effectiveness of the Order.

XO relies on a statement in an August 12, 2005, email from Verizon to the CLECs conveying Verizon MA's proposed Compliance Amendment, in which Verizon stated that it would not execute the Amendment "until such time as the DTE decides any such issues on reconsideration and the amendment has been revised as necessary to reflect any such decisions." This statement means only what it says; it does not assert that Verizon MA will not implement the rulings in the Order until an Amendment is executed. Indeed, XO ignores a later statement in the very same email, reminding the CLECs of the very point on which XO now purports to demand clarification: "Finally, please note that the DTE, in its July 14 order, ruled that ... the rulings in its July 14 order became effective as of the issuance date ... and such effectiveness is not delayed while the parties incorporate the rulings into amendment language." *See* Exhibit A to XO Motion, final paragraph. Contrary to XO's Motion, the parties agree as to the effective date of the Order, and there is no need for the Department to take further action on this issue.

5. The Department's ruling that Transitional UNEs cannot be commingled and still enjoy preferential Transitional Pricing was correct and should not be disturbed.

XO claims that the Department erred in approving Verizon MA's language precluding the commingling of special access facilities with de-listed UNEs that are subject to the FCC's transitional plans. *See* XO Motion at 7, *citing* Order at 141. XO asserts that the Department should not have found that such commingling constitutes a prohibited "change" to an embedded base facility because, according to XO, "Verizon need not make any physical change to existing DS1 and DS3 dedicated transport circuits to effectuate [its] commingling obligations ...." *Id.* XO acknowledges that the real issue

is whether the CLEC may commingle such a de-listed UNE and still retain the preferential transitional rates (as opposed to special access rates) over the remainder of the transitional period.

The Department's underlying conclusion that changes are not included in the embedded base for which CLECs may obtain preferential transitional pricing does not depend on whether a given change is a "physical" one or not. Rather, the Department properly held that "once the embedded base is defined, it may not continue to grow through additional lines, moves, changes or new customers," explaining that any other result would be contrary to the FCC's rules, "which clearly state that CLECs may not obtain new delisted UNE arrangements. *See e.g.*, 47 C.F.R. § 51.319(d)(2)(iii)." Order at 76. XO's proffered distinction between physical and non-physical changes to a UNE facility is thus illusory. XO offers no argument (and there is none) that commingling constitutes no change whatsoever in the features or characteristics of a UNE loop or dedicated transport facility. The Department should deny XO's effort to retain preferential transitional pricing for de-listed UNEs when a CLEC seeks to remove the UNE from the embedded base by commingling it with special access services.

6. The Department should not reconsider its conclusion that additional lines, moves and changes are not included in the embedded base.

AT&T claims that the Department's conclusion that "additional lines, moves, or changes are not included in the 'embedded base'" is not supported by the rule cited by the Department, 47 C.F.R. § 51.319(d)(2)(iii). AT&T argues briefly that because the rule includes the phrase "embedded base of end-user customers," it clearly and unambiguously requires the embedded base to be determined on a customer basis. *See* AT&T Motion at 6-7. AT&T quotes only a portion of the rule, however, and ignores the

sentence relied on by the Department, which provides that "Requesting carriers may not obtain new local switching as an unbundled network element." The complete rule and the FCC's intent to transition CLECs off of UNEs, not onto them, requires the conclusion reached by the Department here.

In any event, AT&T's argument as to new UNE arrangements is purely academic. As AT&T admits, its own proposed amendment "does not require Verizon to provision new UNE-P arrangements for an existing customer or ... for a new customer." AT&T Motion at 8. AT&T's true concern is to ensure that Verizon MA continues to "process *feature changes* for customers in [AT&T's] embedded base." *Id.* (emphasis in original). As demonstrated above, the Department properly held that changes to de-listed UNEs are not included in the embedded base.

AT&T's position is largely moot since over 90 percent of Verizon's UNE-P lines are now under substitute arrangements. Moreover, although not required to do so by the FCC's rules, Verizon MA is willing to process feature changes for other CLECs' embedded bases of UNE-P arrangements, where refusal to make such changes would affect the ability of the CLEC's end-user to obtain or remove vertical services (as opposed to changes, such as commingling, which do not affect the services available to the end-user). Thus, there is no need for the Department to revise its conclusion regarding the availability of feature changes to the UNE-P embedded base.

7. The Department correctly concluded that CLECs must recertify EELs provisioned before the effective date of the TRO.

CTC and Lightship object to the Department's finding that EELs provisioned prior to the effective date of the TRO must meet the TRO's service eligibility requirements. *See* CTC/Lightship Motion at 9-10. These CLECs claim that the FCC

strictly limited the application of the new criteria to three circumstances, which exclude application to pre-existing EELs. *Id.* Similarly, XO asserts that the Department should not require CLECs to re-certify that pre-existing EELs comply with the TRO's eligibility criteria. XO Motion, at 8-9.

The CLECs had argued in the main case that they should not have to re-certify that pre-*TRO* EELs satisfy the new *TRO* eligibility criteria. *See e.g.* CCC Initial Br. at 70-71; CCG Reply Br. at 58. In response, the Department noted that the FCC required that "'each DS1 EEL (or combination of DS1 loop with DS3 transport) must satisfy the service eligibility criteria.'" Order at 128, *quoting TRO* ¶ 599. The Department then stated its decision and explained its reasoning as follows:

> In addition, because the FCC stated that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past," we interpret the *Triennial Review Order* as requiring re-certification for existing EELs, and as with new orders, the certification must be circuit specific. Id. at ¶ 589. The eligibility that AT&T claims has already been established is eligibility under the old safe harbor rules. Because the new service eligibility criteria are significantly different from the requirements under the old rules, and because circuits that qualified under the former rules may not qualify under the new rules, it is only logical that the FCC would require re-certification.

Order, at 130 (citations omitted).

The Department's conclusion is well-grounded in the terms of the *TRO*. "Supersede" means to cause to be set aside or to force out of use as inferior. *Mirriam-Webster's Collegiate Dictionary*, 10th Ed., 1999. The FCC's use of the term thus indicates that the old, inferior safe haven rules have been set aside – replaced by superior rules – and are no longer to be used. Furthermore, while the *TRO* does not expressly state that the new criteria apply to pre-existing EELs, neither does it expressly

grandfather pre-existing EELs. The FCC clearly knows how to provide for grandfathering when it wishes (*see e.g.* the line sharing rules and the *TRRO* transition rules), so its failure to explicitly grandfather pre-existing EELs is strong evidence that it meant for them to be subject to the new eligibility criteria.

Indeed, recertification is the only approach that satisfies the FCC's rule. Rule 51.318(b), which lays out the service eligibility criteria, states simply that, "An incumbent LEC need not provide access to [specified combinations of high-capacity loops and transport facilities] unless the requesting telecommunications carrier certifies that all of the following conditions are met:" followed by the detailed listing of the eligibility criteria. 47 C.F.R. § 51.318(b). The rule itself makes no distinction between EELs ordered before the effective date of the *TRO* and those ordered later. Its plain language cannot be read to suggest that the ILEC sometimes *does* have to provide access to EELs even in the absence of certification. By its terms, it relieves Verizon MA from providing unbundled access to any EEL, ordered or provisioned at any time, which is not certified in accordance with the terms of the Rule.

In contrast to the Department's ruling, the CLECs' arguments against re-certification have no basis in Rule 51. 318(b) or the *TRO*. CTC and Lightship contend that "the FCC stated in the TRO that there are *only* three instances when the new service eligibility criteria must be met and *none* of them apply to EELs that were in place prior to the effective date of the TRO," *citing* to *TRO* ¶¶ 593 and 624. CTC/Lightship Motion at 9-10 (emphasis in original). As Verizon MA pointed out in its Initial Brief (at 118), however, neither of these paragraphs suggests that the three examples described therein were meant to be exhaustive. In addition, it is not at all clear that pre-*TRO* EELs would

not fall within any of the three particular examples. *TRO* ¶ 624, cited by CTC and Lightship, provides in part that:

> Before accessing (1) a converted high-capacity EEL, (2) a new high-capacity EEL, or (3) part of a high-capacity commingled EEL as a UNE, a requesting carrier must certify to the service criteria set forth in Part VII.B.2 in order to demonstrate that it is a bona fide provider of qualifying service.

This language neither states nor implies any temporal limitation on the EELs that must be certified, and in fact many pre-*TRO* EELs would be included as "a converted high-capacity EEL."

CTC and Lightship also cite the phrase from ¶ 623 of the *TRO* that "new orders for circuits are subject to the eligibility criteria" in an attempt to show that pre-*TRO* EELs fall outside the scope of the new rules. The CLECs, however, have taken the FCC's phrase out of context. The full sentence states that, "Unlike the situation before the Commission when it issued the *Supplemental Order Clarification*, which only addressed EEL conversions, new orders for circuits are subject to the eligibility criteria." The full sentence reveals that the FCC intended only to clarify that the new criteria apply both to EELs that are the result of a *conversion* of special access services that had already been leased to the requesting CLEC as well as to EELs created directly upon an order for an entirely new circuit not already leased to the CLEC as special access services. The FCC made no distinction here between EELs ordered before the effective date of the *TRO* and those leased later.

The CLECs' reliance on the recommended *TRO* arbitration decision in Vermont is also misplaced. That recommendation, with which Verizon Vermont has filed substantial exceptions to the Vermont Board, is contrary to the law and the Department's

determinations in the Order on a vast array of issues, and provides no useful guidance to the Department. More probative here is a decision from Washington state, which is more in line with the Department's Order on most issues, in which the arbitrator found that, "It is reasonable to require CLECs to recertify any EEL arrangements existing or requests as of the effective date of the Triennial Review Order, subject to the new certification requirements...."[17]

For its part, XO argues only that "the FCC's rule implementing the service eligibility criteria for high capacity EELs explicitly applies *only on a prospective basis*, where a requesting telecommunications carrier seeks access to network elements to 'establish a new circuit or to convert an existing circuit from a service to unbundled network elements.'" XO Motion at 8, *citing* 47 C.F.R. 51.318(a) (emphasis added). Here again, the CLEC has distorted the meaning of an FCC statement by taking it out of context. Rule 51.318(a) states, in full, as follows:

> Except as provided in paragraph (b) of this section, an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.

This rule provides only that an ILEC may not reject an order for a UNE or a combination of UNEs on the ground that the order seeks to establish a new circuit or on the ground that the order seeks to convert a special access service to a UNE. Contrary to XO's assertion, the rule does not imply in any way that the service eligibility criteria apply "only on a prospective basis." Indeed, Rule 318(a) doesn't address the service eligibility

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[17] *See,* In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc., Docket No. UT-041013, Order No. 17, *Arbitrator's Report and Decision*, at 175.

criteria at all (which are spelled out in Rule 318(b)) but by its terms applies only to those UNEs and combinations that are *not* specifically addressed in Rule 318(b).

Finally, the CLECs' position makes no sense in terms of the FCC's policy underlying its EEL certification requirements. In the *TRO*, the FCC tightened these criteria to better prevent abusive arbitrage practices. *See TRO*, ¶¶ 591, 600. Given this objective, it would have made no sense for the FCC to apply its new criteria only to "new" combined circuits, without cleaning up the very abuses in past practice that drove it to establish the new criteria in the first place.

8. The Department properly rejected the CLECs' proposals to litigate wire center designations in advance of any actual dispute over the availability of UNE loops and transport.

XO takes issue with the Department's decision rejecting the CLECs' proposals to litigate, in advance of any actual dispute, Verizon MA's designation of the wire centers that satisfy the FCC's non-impairment criteria and to incorporate the resulting list of Department-approved wire centers into the parties' ICAs. *See* XO Motion at 9; Order at 279. XO asserts that this decision "unduly limits" CLECs' ability to confirm Verizon MA's wire center designations and that "the Department must provide a forum to verify Verizon's application of the criteria for section 251 loop and dedicated transport unbundling relief." XO Motion at 9. It further charges that the Department's decision "effectively deprives Massachusetts CLECs any opportunity to access or undertake a meaningful review of the factual data supporting Verizon's claims..." i*d.* at 10, and that the Department fails to "provide adequate regulatory certainty critical to the stability of CLECs' business plans...." *Id.* at 11. As rationale for its claims, XO states that "the possibility of future litigation initiated by Verizon, for the purpose of challenging a

requesting carrier's self-certified order for UNEs . . . threatens to consume substantial CLEC resources...." *Id.* XO contends that the Department must determine the proper designations of all wire centers up front in order to "avoid the burden and expense of multiple, successor proceedings." *Id.*

XO's claims have no basis in fact, and its concerns are already fully addressed in the Order. In rejecting the CLECs' proposed language on wire center designations, the Order adopted the process established by the FCC in ¶ 234 of the *TRRO*, in which wire center designations will be litigated on a case-by-case basis if and when disputes arise. That process allows the CLECs ample opportunity to "confirm," "verify," "review," and contest Verizon MA's back-up data and its application of that data to the FCC's criteria. Even without litigation, CLECs will have ample opportunity "to access [and] undertake a meaningful review" of Verizon MA's back-up data at the "diligent inquiry" stage, pursuant to the amendment to the ICAs. *See* Order at 286 (requiring the amendment to include terms "incorporating Verizon's commitment to produce" back-up data and stating the specific data that will be provided).

With respect to XO's claim that case-by-case resolution of wire center disputes may be expensive, the Department has already found that such a process is likely to be more efficient than litigating the status of all wire centers up front, because many of those wire centers may never become the subject of a dispute. As the Department stated:

> After its reasonably diligent inquiry, a CLEC may be satisfied that a wire center meets the FCC's non-impairment threshold and a dispute may never arise for the Department to resolve. The CLECs' proposal, however, would require us to resolve the matter as to each wire center on Verizon's list filed with the FCC before a dispute, if ever, arises. Committing our resources to this endeavor would be less efficient than waiting until an actual dispute, if any, arises.

Order at 279. XO has offered no new information or a fresh perspective to justify reconsideration of this finding.

As to the business risk a CLEC may run by placing an order for a UNE from a wire center not appearing on Verizon MA's list, that risk is minimized by the opportunity to review Verizon MA's back-up data before placing an order, and in any event is appropriate to ensure compliance with the FCC's "reasonably diligent inquiry" prerequisite. *See* Order at 280. As the Department also pointed out, even a Department-approved list of non-impaired wire centers would not eliminate the risk and uncertainty inherent in ordering a UNE loop or transport facility (when not in accordance with Verizon MA's wire center designations), because additional wire centers may satisfy the FCC's non-impairment criteria after the Department makes its determinations. *Id.* Again, XO has no basis for reconsidering the Department's analysis.

The Department also rejected the CLECs' wire center proposal on the independent ground that incorporating a list of Department-approved wire centers into the parties' ICAs could allow CLECs to obtain, in violation of the Act, UNEs from wire centers which come to meet the FCC's non-impairment criteria in the future, "by limiting Verizon's ability to update its non-impaired wire center list except on a periodic basis." Order at 282. The amendment proposed by XO contains just such a provision.[18] XO's effort to unlawfully freeze into place an approved list of wire centers is alone grounds for denying its motion as to this issue.

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[18] *See* CCG Amendment § 3.10.3 (allowing annual changes only).

9. The Department properly found that Verizon MA may discontinue UNEs de-listed by the FCC without amending CTC's interconnection agreement.

CTC claims that the Department erred in finding that § 1.5 of the UNE Remand Attachment to CTC's ICA authorizes Verizon MA to discontinue UNEs that were de-listed in the *TRO* without first negotiating an amendment to the ICA. *See* CTC/Lightship Motion at 11. CTC offers two arguments in support of its claim of error, neither of which has merit.

First, CTC asserts that the *TRO* and the *TRRO* did not "trigger" §1.5 of the UNE Remand Attachment because those orders eliminated only Verizon MA's obligations to provide UNEs under section 251 of the Act, and thus did not find that Verizon MA is "not required by Applicable Law" to provide such UNEs, as required by §1.5. Specifically, CTC argues that Verizon MA remains obligated to provide network elements under section 271 of the Act, which it alleges constitutes "Applicable Law" under the ICA. *See*, CTC/Lightship Motion at 11-12.

Of course, this is simply a rehash of the argument CTC and other CLECs advanced in the main case.[19] *See* CCC Reply to Verizon MA's Response to Briefing Questions, filed on April 26, 2005, at 4-5; Order at 16-17. In rejecting that argument, the Department found that the only law applicable to the ICA is section 251 of the Act and related regulations, and that section 271 obligations are *not* incorporated into the agreement. As the Department explained:

> We find, however, that [CTC's] reading [of the term "Applicable Law"] ignores the last clause of the definition of Applicable Law common to all of these interconnection agreements: "applicable to

[19] Thus, CTC's argument affords no basis for reconsideration, and the Department may deny this portion of the CTC/Lightship motion on this ground alone. *Commonwealth Electric Company*, D.P.U. 92-3C-1A, at 3-6 (1995) (motion for reconsideration should not reargue issues considered and decided in the main case); *Boston Edison Company*, D.P.U. 90-270-A, at 3 (1991) (same).

> each Party's performance of its obligations *under this agreement*'" Order at 17 (citation omitted, emphasis added by Department). The obligations "under this agreement" that the *Triennial Review Order* and the *Triennial Review Remand Order* have modified are Verizon's obligations under the UNE Attachment. ***The law applicable to the parties' performance of such obligations arise under 47 U.S.C. § 251 and 47 C.F.R. Part 51. While Verizon may have ongoing obligations to provide network elements arising from other sources of law, the FCC has stated that those obligations are independent of an ILEC's UNE obligations.*** *Triennial Review Order* at ¶ 653-55.

Order, at 17, (emphasis added). The Department's conclusions are correct. As Verizon MA demonstrated in its Initial Brief, at 136-141, and its Reply Brief, at 75-77, section 271 obligations are not UNEs and are not incorporated into section 251 or Verizon MA's interconnection agreements.

CTC claims that § 3 of the Pricing Appendix to the UNE Remand Amendment "confirms Verizon's ongoing obligation to provision the affected elements pursuant to § 271(c)(2)(B)." CTC completely misconstrues § 3. That section does *refer* to Verizon MA's independent obligations under section 271 but only to make clear that they are *not* covered by the ICA and its TELRIC pricing methodology under section 251. Section 3 provides that ***if*** Verizon MA provides a service "under the Agreement" which it is required to provide by section 271 but not by section 251, then Verizon MA's prices for those services need not comply with the pricing strictures of section 251. *See* Pricing Appendix to UNE Remand Amendment, § 3. Accordingly, § 3 does not impose an *obligation* on Verizon MA to provide CTC with section 271 services but comes into play only *if* Verizon MA chooses to provide such services under the ICA. Of course, Verizon MA has not in fact provided any such services to CTC under the ICA, and CTC has made no claim to the contrary. If § 3 is relevant here at all, it is to confirm that Verizon MA's

prices for network elements under section 271 are *not* governed by section 251 or the ICA, which is limited in scope to effectuating section 251 and its TELRIC pricing methodology. Thus, CTC provides no basis on which to find that the ICA governs Verizon MA's obligations under section 271.

CTC's second contention is that the Department erred in finding a conflict between UNE Remand Attachment § 1.5, which allows Verizon MA to discontinue provisioning of de-listed UNEs without amending the ICA, and the general change-of-law provisions of §§ 8.2 and 8.3 of the ICA, which would require the parties to negotiate an amendment before a UNE may be discontinued. *See* CTC Motion at 13. According to CTC, § 2 of the UNE Remand Amendment precludes the Department from finding such a conflict and requires the Department instead to "harmonize" these provisions, which CTC suggests can be done by finding that UNE Remand Attachment § 1.5 allows Verizon MA to terminate de-listed UNEs but does not specifically authorize Verizon MA to do so without first amending the ICA. *Id.* at 13-14. CTC's argument stretches the meaning of §§ 1.5 and 2 beyond the bounds of rationality and must be rejected.

To begin with, UNE Remand Amendment § 2 is standard language providing that the terms of the Amendment control in the event of a conflict between those terms and the terms of the initial ICA. It then provides, again in standard language, that "the fact that a term or provision appears in this Amendment but not in the Terms, or in the Terms but not in this Amendment, shall not be interpreted as, or deemed grounds for finding a conflict for purposes of this Section 2." Thus, § 2 does not preclude the Department from ever finding a conflict between the Amendment and the ICA, as CTC contends, but only

clarifies that the mere fact that different terms appear in the ICA and the Amendment should not alone be read to create a conflict.

Here, the Department's analysis of the Group 1 ICAs (which provides the basis for its findings with respect to CTC's ICA, in Group 3), does not rest on the mere differences in language of the ICA and the Amendment. Rather, the Department found a real-world conflict between those terms, in that a duty imposed on Verizon MA to renegotiate the terms of the ICA in order to discontinue UNEs that had been de-listed "would be unenforceable" in light of Verizon MA's § 1.5 right to discontinue such service pursuant to the *TRO* and *TRRO*. *See* Order at 16. The Department held that:

> In order to interpret General Terms and Condition § 4.6 [the Group 1 analogue to CTC's §§8.2 and 8.3] in a manner that does not render it unenforceable, we construe the right to terminate pursuant to UNE Attachment § 1.5 as a modification of General Terms and Condition § 4.6, such that the duty to negotiate applies only when the change of law results in an ongoing right or obligation under the interconnection agreement, not when it eliminates entirely such rights or obligations.

Id. The conflict rules in § 2 of the UNE Remand Amendment do not preclude this form of real-world analysis, and the Department correctly found and resolved a conflict between the general change-of-law terms of the ICA and the very specific terms of UNE Remand Attachment § 1.5 applicable to the discontinuance of de-listed UNEs.[20]

Moreover, CTC's proposed "harmonization" of UNE Remand Attachment § 1.5 and ICA §§ 8.2 and 8.3 would read § 1.5 out of the contract. That section expressly provides that where the FCC has de-listed a UNE or Combination provided under the ICA, "Verizon may terminate its provision of such UNE or Combination to CTC." CTC

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[20] CTC does not take issue with the Department's finding, Order at 15, that in the event of a conflict between contractual terms, the more specific term is controlling.

contends that because this section does not expressly state that Verizon MA may terminate the de-listed UNE or Combination without a contract amendment, then the general terms of § 8.2 apply and require such an amendment. CTC/Lightship Motion at 13-14. Such a reading would reduce § 1.5 to a statement that Verizon MA is entitled to a contract amendment in order to effectuate a decision by the FCC to de-list a UNE, a right which is already fully provided by the change-of-law provisions of §§ 8.2 and 8.3 of the ICA and is arguably guaranteed by federal law in any event. The Department cannot adopt a reading of § 1.5 that gives it no meaning. The only reading of § 1.5 that gives it meaning is that already adopted by the Department – that §1.5 authorizes termination of a de-listed UNE without a contract amendment.

Finally, CTC fails to account for § 2.2 of CTC's opt-in agreement, which provides as follows:

> The Parties agree that if any judicial or regulatory authority of competent jurisdiction determines (or has determined) that BA is not required to furnish any service or item or provide any benefit to Telecommunications Carriers otherwise required to be furnished or provided to CTC hereunder, then BA may, at its sole option, avail itself of any such determination by providing written notice thereof to CTC.

Section 2.2 gives Verizon MA the sole option to avail itself of the de-listing decisions in the *TRO* and the *TRRO,* and states that it may do so by written notice, thus precluding any argument that a contract amendment is necessary under §§ 8.2 or 8.3. The Department declined to make a finding as to § 2.2 in light of UNE Remand Attachment § 1.5, but § 2.2 affords a wholly independent ground in support of the Department's conclusion that no amendment of CTC's ICA is necessary in order to implement the FCC's UNE de-listing decisions in the *TRO* and *TRRO.*

CTC fails to address § 2.2 in its motion, but it had previously argued that § 2.2 allows Verizon MA to avail itself of the *TRO* and *TRRO* decisions only by contract amendment, because "the TRO explicitly stated that carriers must follow their ***existing*** change of law provisions to implement the TRO, and 'decline[d] the request of several BOCs that [the FCC] override the section 252 process and unilaterally change all interconnection agreements.'" CCC Reply to Verizon MA's Response to Briefing Questions, at 9, citing TRO ¶¶ 700-701 (emphasis in original). CTC's reliance is misplaced, however, because § 2.2 of the opt-in agreement ***is*** an "existing change of law provision," in that it addresses the parties' rights in the event of a change in the laws applicable to the contract. It is thus precisely the kind of provision that the FCC refused to override. Accordingly, the FCC's failure to "unilaterally change all interconnection agreements," *TRO* ¶ 701, *supports* application of the change-of-law terms in § 2.2 of the opt-in agreement, and Verizon MA is entitled to discontinue the delisted UNEs on notice only, independent of ICA §§ 8.2 and 8.3 and UNE Remand Attachment § 1.5.

10. The Department properly found that Verizon MA may discontinue UNEs de-listed by the FCC without amending Lightship's interconnection agreement.

Section 11 of Lightship's ICA requires Verizon MA to offer Lightship "nondiscriminatory access to Network Elements on an unbundled basis" but further provides that Verizon MA "shall not have any obligation to continue to provide such access with respect to any Network Element listed in Section 11.1 (or otherwise) that ceases to be subject to an unbundling obligation under Applicable Law...." Lightship contends that the Department erred in finding that the only laws applicable to Verizon MA's obligations under § 11 are § 251(c)(3) of the Act and the rules promulgated by the *TRO* and the *TRRO,* and that Verizon MA's independent obligations under section 271

are not cognizable under § 11. *See* CTC/Lightship Motion at 14-15; Order at 21. Lightship argues that section 271 requires Verizon MA to provide access to UNEs "on an unbundled basis" as provided in § 11 because section 271 uses the word "'unbundled' to describe the basis on which the elements must be provided." CTC/Lightship Motion at 15. Lightship also argues that its amended ICA does not limit Verizon MA's unbundling obligations to those imposed by section 251 of the Act. *Id.* Neither of these arguments holds up to scrutiny.

Lightship misreads section 271. As Verizon MA demonstrated in its Initial Brief, at 140-142, the FCC has made clear that elements provided under section 271 *are not unbundled network elements, UNEs.* The obligation to provide UNEs arises under section 251(c)(3), which specifically requires an ILEC to provide "nondiscriminatory access to network elements on an unbundled basis" – the exact same language appearing in § 11 of the ICA. The very different obligations under section 271(c)(2)(B) checklists items 4, 5, 6 and 10 — which never use the terms "network element," "unbundled network element" or "network elements on an unbundled basis" — are "independent" of "any unbundling analysis under section 251." *Triennial Review Order* ¶ 653. Section 271 uses the term "unbundled" only in the sense of "separate" or "disconnected" – as in checklist item 6's reference to "[l]ocal switching unbundled from transport, local loop transmission, or other services" – and not to conjure up the specific conditions and pricing terms required by section 251(c)(3). Thus, the D.C. Circuit held in *USTA II* that "the CLECs *have no serious argument*" that section 251 obligations apply to section 271's checklist items four, five, six, and ten (*i.e.*, unbundled items). 359 F.3d at 589. Likewise, the Department properly held that the reference in section 271(c)(1)(A) to a

binding agreement "approved under Section 252" "does not convert checklist items 4 (loops), 5 (transport), 6 (switching) and 10 (databases and signaling) into terms that may be resolved by compulsory arbitration under § 252, *i.e.*, § 251 obligations." Order at 262 (footnote omitted).

Lightship's claim that its ICA as amended does not limit Verizon MA's unbundling obligations to those imposed by section 251, and therefore includes section 271 obligations, is simply incorrect as a matter of fact. The second "Whereas" clause in the ICA expressly states that the parties' intent in entering into the agreement is to satisfy the requirements of section 251 and 252, as follows:

> WHEREAS Sections 251 and 252 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Act") have specific requirements for Interconnection, unbundled Network Elements and resale service, and the Parties intend that this Agreement meet these requirements;

The parties made no mention of section 271. Indeed, the entire ICA and its four amendments refer to section 271 only twice – once in ICA § 27.2 where the parties agreed that they would revise any provision of the agreement that "is likely to adversely affect" Verizon MA's application pursuant to section 271 to provide long distance service, and once in § 3 of the UNE Remand Amendment Pricing Attachment, which as discussed above, only confirms that the obligations imposed by section 271 are not covered by the ICA.

Moreover, Verizon MA's UNE obligations under the ICA are governed by the UNE Remand Amendment and its Attachment. *See* UNE Remand Amendment ¶ 1. As its name implies and as made clear by the explicit reference in the fourth "Whereas"

clause,[21] the purpose of that amendment was to implement the terms of the FCC's *UNE Remand Order*, which in turn attempted to effectuate the terms of section 251 of the Act, not section 271. The amended ICA cannot reasonably be read to incorporate section 271 as Applicable Law in light of: (1) the express terms of the ICA and the UNE Remand Amendment (including the use in § 11 of the ICA of the precise unbundling language used in section 251(c)(3)), and (2) the lack of any express contract term implementing any obligations imposed by section 271.

Accordingly, the Department's finding that the law applicable to Verizon MA's UNE obligations under § 11 of the ICA is section 251 and related regulations, and not section 271, is correct and should not be disturbed.

11. The Department properly found that four-line carve-out switching is not included in the embedded base of mass market switching for purposes of the FCC's transitional rules.

AT&T objects to the Department's decision rejecting the CLECs' attempt to add four-line carve-out switching customers to the FCC's transition plan for mass market switching. Order at 78-79. Specifically, AT&T claims that the *TRRO* "eliminated the Four Line Carve Out as an issue in Massachusetts...." AT&T Motion at 5. Further, while AT&T tacitly admits that the FCC did not require Verizon MA to provide four-line carve-out switching prior to the effective date of the *TRRO*, it nevertheless claims that because Verizon MA had been prevented from actually discontinuing such switching by that date (due to the need to amend its ICA by way of this very arbitration), then four-line

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[21] "WHEREAS, the Federal Communications Commission (the "FCC") issued an order on November 5, 1999 in CC Docket No. 96-98 (the "UNE Remand Order"), and issued a supplemental order on November 24, 1999 in the same proceeding, which orders became effective in part as of February 17, 2000 and fully effective as of May 17, 2000;"

carve-out switching must be included in the transition plan. *Id.* at 6. AT&T's position has no basis in the *TRRO* and the *TRO*.

With respect to the *TRRO*, AT&T claims that the FCC "eliminated" the four-line carve-out rule by observing in a footnote to the *TRRO* that "the *Triennial Review Order* left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise customers for unbundled local switching." *See* AT&T Motion at 5, *citing* TRRO ¶ 226, n. 625. The inference AT&T would have the Department make here defies common sense and would be inconsistent with other provisions of the order. In the first place, AT&T does not contest the Department's finding that the FCC created the four-line carve-out in 1999, Order at 78 (referring to the *UNE Remand Order*), and that the FCC reaffirmed that decision in the *TRO*.[22] It strains credulity to suggest that the FCC overruled both the *UNE Remand Order* and the *TRO* without discussion, without an express statement to that effect or even without so much as a reference to the rule supposedly being reversed.

Second, as the Department noted, the FCC had already eliminated enterprise and four-line carve-out switching before the D.C. Circuit's vacatur in *USTA II*, and the court did not vacate the four-line carve-out and enterprise switching rules. Given that the entire *raison d'etre* of the *TRRO* was to address the issues that court had vacated and/or remanded to the FCC, the Department cannot presume that the FCC intended, in its footnoted observation, to reverse a prior ruling that had *not* been vacated or remanded to it. Indeed, as the Department noted, the FCC expressly stated in the *TRRO* that "the D.C.

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22 *See TRO* ¶ 525, stating that, "we retain the four-line 'carve-out' from the unbundled local circuit switching obligation" whereby "incumbent LECs are not obligated to provide unbundled local circuit switching to requesting carriers for serving customers with four or more DS0 loops in density zone one of the top fifty MSAs."

Circuit upheld our enterprise switching rules and, consequently, *they are not at issue here*." *TRRO* ¶ 201, n. 533. Contrary to AT&T's interpretation of footnote 625, the FCC did not intend to address four-line carve-out switching in the *TRRO* or the rules promulgated thereby.

Third, the FCC has consistently treated four-line carve-out switching as part of its *enterprise switching* regime, not as part of its mass market regime. Four-line carve-out switching is addressed in the FCC's rules as subsection (ii) to the enterprise switching rule, 47 C.F.R. 51.319(d)(3), captioned "DS1 capacity and above (*i.e.* enterprise market) determinations," rather than as part of the mass market switching rule at 47 C.F.R. 51.319(d)(2). Thus, the FCC's comment that its "enterprise switching rules" were not at issue in the *TRRO*, *TRRO* ¶ 201, n. 533, encompasses the four-line carve-out rule.

Fourth, the *TRRO*'s statement that the *TRO* "left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise customers" is not inconsistent with the continued viability of the four-line carve-out rule. That rule by its terms applies only in density zone one of the top 50 MSAs, leaving unresolved the number of DS0 lines that would distinguish the mass market from the enterprise market in the rest of the country. The *TRO* had anticipated that state commissions would determine this issue, but the state proceedings were shut down due to *USTA II* without ever reaching the issue. This is the situation the FCC was referring to in the statement so heavily relied on by AT&T. Nothing more.

AT&T also claims that *TRRO* footnote 625 "made it absolutely clear the twelve-month transitional plan applied to *all* [emphasis in original] UNE-P DS0 arrangements used to serve customers at a single location, *as long as they do not exceed DS1 capacity*."

AT&T Motion at 5 (final emphasis added). The text of the *TRRO* to which footnote 625 is appended, however, makes no reference to DS1 capacity but instead expressly "establish[es] a transition plan to migrate the embedded base of unbundled local circuit switching *used to serve mass market customers*...." *TRO* ¶ 226 (emphasis added). Of course, the four-line carve-out rule itself defines the mass market to consist of customers served by three or fewer DS0 lines and the enterprise market to include all customers with four or more DS0 lines or higher capacity service, at least in density zone one of the top 50 MSAs. Thus, four-line carve-out switching customers are part of the enterprise market, not the mass market, and do not fall within the scope of the FCC's transition rules for the mass market. That the FCC treated four-line carve-out switching as a subset of enterprise switching, and not mass market switching, is made clear by the fact, noted above, that it placed the four-line carve-out rule within its enterprise switching rule, 47 C.F.R. 51.319(d)(3), not the rule governing mass market switching.

AT&T, moreover, has no response to the simple fact that the new rules the FCC issued with the *TRRO left the four-line carve-out rule in place*, even while rewriting its mass market switching rule. Thus, the four-line carve-out rule at 47 C.F.R. 51.319(d)(3)(ii) remains good law, though its impact is now limited to defining the scope of the mass market for transition purposes.

Finally, AT&T argues that because Verizon MA had not actually discontinued its switching service to AT&T's four-line carve-out customers as of March 11, 2005 – the date on which the embedded base was defined – those customers must be included in the embedded base for purposes of the FCC's transition rules. AT&T Motion at 5. Obviously, Verizon MA had not discontinued that service solely because of the long

delays in this progress of this arbitration, which Verizon MA timely filed more than 18 months ago. As the Department found, "To the extent that CLECs may have continued receiving delisted enterprise and four-line carve-out switching pending completion of change of law processes, the delay does not serve to negate the operation of the FCC's unbundling regime ...." Order at 79. It would be poor public policy indeed to allow the vagaries of case scheduling to render null and void the FCC's longstanding four-line carve-out policy and its duly promulgated rule.

12. The Department correctly found that the TRRO did not modify the parties' obligations concerning unbundled access to interconnection facilities, and should decline to reconsider that finding now.

AT&T argues that the Department erred in concluding that the *TRRO* did not modify the parties' obligations concerning unbundled access to entrance facilities. AT&T Motion at 12. Specifically, AT&T contends that the FCC clarified that CLECs have a right to obtain access to entrance facilities pursuant to section 251(c)(2) and the ICA Amendment should include that clarification. *Id.*, at 13. AT&T's position is without merit and should be rejected by the Department.

First, contrary to AT&T's claim, the Department correctly found that "[t]he FCC made no finding, clarifications, or statements in the Triennial Review Order or Triennial Review Remand Order that changed the parties' pre-existing rights and responsibilities concerning interconnection facilities." Order at 224. Indeed, AT&T points to nothing in either FCC order that affects interconnection rights under section 251(c)(2). All the FCC observed regarding interconnection was that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of

telephone exchange service and exchange access service." *TRRO* ¶ 140. Since the FCC did not purport to change its existing rules in this respect, there is no basis upon which the Department could properly order the parties to change the related terms of their existing interconnection agreements, and the Department should reject AT&T's argument on these grounds alone.

Second, AT&T's claim that Verizon MA has an obligation under section 251(c)(2) to provide entrance facilities on an unbundled basis (and no doubt, at TELRIC rates) is wrong and is intended to obtain unbundling from Verizon MA where AT&T has never had such a right under the Act or FCC rules for the purpose of interconnection.

Section 251(c)(2) of the 1996 Act imposes upon ILECs the obligation "to provide *for the facilities and equipment of any requesting telecommunications carrier*, interconnection *with the local exchange carrier's network*, . . . at any technically feasible *point within the carrier's network* . . . ." (Emphasis supplied.) The statutory obligation requires the ILEC to enable CLECs to connect *their own facilities* to the ILEC's network, at a "point" *on the ILEC's network.* Section 251(c)(2) does not impose any obligation on ILECs to provide unbundled facilities for the purpose of interconnection, but requires that an ILEC provide a point or points on its network at which a CLEC may hand-off its exchange and exchange access traffic and the means for the CLEC's facilities to access that interconnection point. Thus, when defining the ILECs' interconnection obligation, the FCC identified six technically feasible "points" on their networks at which ILECs must enable CLECs to connect their facilities. Those are: (1) the line side of a local switch (for example, at the main distribution frame); (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect

points; (5) out-of-band signaling transfer points; and (6) the points of access to unbundled elements. *LCO* at ¶ 212. As the FCC concluded, "the term 'interconnection' under section 251(c)(2) refers only to the *physical linking* of two networks for the mutual exchange of traffic" and does not include the "transport and termination" of traffic. *Local Competition Order* at ¶ 176. Thus the ILEC interconnection duty is to allow access for the CLEC to connect at these points, such as through the provision of collocation and Point of Termination ("POT") bays within the central office – not to unbundle office-to-office transport facilities like entrance facilities as if they were still UNEs.

AT&T's theory that Verizon MA's section 251(c)(2) interconnection obligation enables CLECs to lease at TELRIC rates the entrance facilities that the FCC has de-listed would render the FCC ruling on those facilities meaningless. In the *TRRO*, the FCC held that "competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competing LEC's network *in any instance*." *See TRRO* at ¶ 5 (emphasis added); *TRRO* at ¶¶ 49, 66, 137-38, 141. According to AT&T's theory, Verizon MA might not have to provide an entrance facility at TELRIC rates for purposes of unbundling, but it *would have to* provide the same facility at TELRIC rates for purposes of interconnection. Neither the *TRO* nor the *TRRO* contemplates such diametrically opposed results. Indeed, the *TRO* states: "Moreover, we find that our more limited definition of transport is consistent with the Act because it encourages competing carriers *to incorporate those costs within their control* into their network deployment strategies rather than to rely exclusively on the incumbent LEC's network." *TRO* at ¶ 367. This rationale applies equally to the deployment of facilities by CLECs necessary to

gain access to interconnection points on Verizon MA's network, because it encourages CLECs to build facilities to be able to truly compete in the marketplace.

AT&T also ignores that neither the *TRO* nor the *TRRO* purports to establish new rules regarding CLECs' rights to obtain interconnection under section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. As discussed above, section 251(c)(2) obliges an ILEC to accommodate interconnection, but not to "provide the 'facilities and equipment' *for* the requesting telecommunications carrier." Indeed, the only facilities mentioned in section 251(c)(2) are *CLEC* facilities, and "interconnection" in the FCC's rules is defined as "the linking of two networks for the mutual exchange of traffic," and specifically excludes "the transport and termination of that traffic." 47 CFR 51.5. Thus, the only facilities that an ILEC is legally required to provide as interconnection under section 251(c)(2) are those necessary to receive CLEC facilities at the points of interconnection on the ILEC's network, such as collocation, cross-connections and POT bays.

Verizon MA implements its section 251(c)(2) obligation by providing collocation at wire centers and cross-connections and similar facilities at interconnection points. Nothing in section 251(c)(2) or the FCC's interconnection rules requires that an ILEC construct or provide transport facilities to enable the CLEC to get from its switch to the access points of interconnection on the ILEC's network. To the extent that an ILEC was required to provide UNE entrance facilities, then CLECs were able to lease such facilities, and use them to carry traffic on their networks to the point of interconnection with the ILEC. However, since entrance facilities are no longer available as UNEs under the 1996 Act and FCC's rules, a CLEC must utilize its own facilities to transport traffic

to the interconnection point within a Verizon office, lease third-party facilities, or purchase special access services from the ILEC.

The Illinois Commission understood that this is the proper interpretation of both § 251(c)(2) and the *TRO*:

> The Commission concludes that SBC's position is correct. First, nothing in subsection 251(c)(2) itself mentions ILEC facilities, much less creates an obligation to provide them. Second, the FCC's analysis of ILEC duties under that subsection does not create such an obligation either. The *TRO* language on which XO relies (in ¶¶ 365, 366 and 368) simply does not support XO's claims to the contrary.
>
> *TRO* ¶ 365 refers to "the facilities that [ILECs] explicitly must make available for section 251(c)(2) interconnection." Since the only facilities explicitly mentioned in 251(c)(2) are *CLEC* facilities, we must infer that the FCC is alluding to the facilities that an ILEC must have ready to receive those CLEC facilities. We cannot infer more, given the definition of "interconnection" in FCC rules as "the linking of two networks for the mutual exchange of traffic," and the specific exclusion of "the transport and termination of that traffic" from that definition. 47 CFR 51.5.
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> *TRO* ¶ 366 refers to the facilities needed by CLECs to interconnect with [a] LECs network. Once more, we construe this reference to pertain to the facilities an LEC must have ready to accommodate the CLEC's own facilities used in interconnection. Again, the only facilities identified in 251(c)(2) are CLEC facilities, and the above-cited FCC rule excludes transport and termination from the definition of interconnection. Thus, the ILEC's obligation is to provide connection to the *CLEC facilities*, including transport and termination facilities, that the CLEC employs to interconnect with the ILEC's network.
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> *TRO* ¶ 368 says this: "all telecommunications carriers . . . will have the ability to access transport facilities *within* the incumbent LEC's network, pursuant to section 251(c)(3), and to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to section 251(c)(2)." (Emphasis in original.) The FCC thus uses the term "facilities" only in connection with

> 251(c)(3), not in connection with 251(c)(2). That is entirely consistent with the language and titles of the respective statutory provisions. As SBC states, 251(c)(2) obliges an ILEC to accommodate interconnection, but not to provide the facilities and equipment *for* the requesting telecommunications carrier.

Amendatory Arbitration Decision, *XO Illinois, Inc. Petition for Arbitration*, No. 04-0371, 2004 WL 3050537, at *68 (Ill. C.C. Oct. 28, 2004).[23]

The Texas Public Utilities Commission likewise recently ruled as follows:

> Given that entrance facilities are not available as UNEs, a CLEC should not be able to obtain those facilities at TELRIC rates merely by characterizing those same facilities as interconnection facilities instead of entrance facilities. To do so would contradict the FCC's finding that ILECs do not have to provide entrance facilities as UNEs. This Commission concludes that, whether for interconnection or for unbundled access to network elements, entrance facilities are not subject to TELRIC rates.[24]

In short, AT&T's argument fails to recognize the critical distinction between section 251(c)(2) and (c)(3) obligations, and thereby attempts to negate the FCC's unambiguous determination that Verizon MA has no obligation to provide entrance facilities "in any instance." Moreover, AT&T's position thwarts the federal policy

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[23] *Accord* Arbitration Decision, *MCImetro Access Transmission Services, Inc., et al. Petition for Arbitration*, No. 04-0469, 2004 WL 3119795, at *82 (Ill. C.C. Nov. 30, 2004) ("[T]he interconnection obligation under Section 251(c)(2) extends only to the physical linking of networks; it does not obligate an ILEC to provide facilities to connect the networks. In other words, the only obligation in Section 251(c)(2) is to provide 'interconnection,' namely, the 'linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic,' 47 C.F.R. § 51.5.").

[24] Arbitration Award – Track I Issues, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 16 (Tex. P.U.C. Feb. 22, 2005) (footnote omitted). In a subsequent arbitration decision, the Texas PUC confirmed that the term "interconnection facilities" in the contract "*does not refer to the physical circuit that links the CLEC office to the ILEC office.* The Commission finds that the interconnection facilities referred to in the TRO are cross-connect facilities necessary to interconnect CLEC collocation equipment with the ILEC network." Texas Track II Arbitration Award, Decision Matrix at 109-10 (emphasis in original).

intended to encourage CLECs to deploy their own facilities. The Department should, accordingly, affirm its correct decision that nothing in the *TRO* or *TRRO* changed Verizon MA's obligations with respect to section 251(c)(2) interconnection, and that it is not necessary to address this matter in the *TRO* amendment..

13. The Department's approval of Verizon MA's language concerning payment of audit expenses is consistent with the TRO and should not be disturbed.

AT&T asserts that, contrary to the Department's findings in the Order, Verizon MA's proposed Amendment 2 does not properly implement the *TRO*'s directives with respect to the allocation of the cost of an ILEC's audit of a CLEC's compliance with the EEL service eligibility criteria. Specifically, AT&T asserts that Amendment 2 fails to apply the "materiality" standard used by the FCC for determining whether the ILEC or the CLEC will pay for the audit. *See* AT&T Motion at 14-15.

AT&T is wrong. As AT&T acknowledges, Verizon MA's Amendment 2 states that the purpose of the annual audit is to "audit [the CLEC's] compliance in all material respects with the service eligibility criteria applicable to High Capacity EELs." The Department expressly approved this language in the Order, at 131-132. With respect to determining which party must pay for the audit, Amendment 2 provides that "to the extent the independent auditor's report concludes that [the CLEC] failed to comply with the service eligibility criteria for any DS1 or DS1 equivalent circuit," then the CLEC must pay for the audit. Verizon MA Amendment 2, §3.4.2.7. Conversely, "[s]hould the independent auditor confirm [the CLEC's] compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit," then Verizon MA must pay for the audit. *Id.* Given that the very purpose of the audit is to determine whether the circuits ordered by the CLEC satisfy the FCC's eligibility criteria, it cannot reasonably be argued that the

failure of a circuit to meet those criteria is anything *other than* a failure to comply with the criteria in a material respect. Verizon MA's language properly implements the *TRO,* and the Department should let its approval of that language stand.

AT&T also claims that where a CLEC is required to reimburse Verizon MA for the cost of the audit, Verizon MA's proposed amendment language would "shift responsibility to the CLEC for *all* costs of the audit, presumably including Verizon's internal costs." AT&T Motion at 15 (emphasis added). That was not Verizon MA's intent. Nevertheless, in order to avoid a needless dispute, Verizon MA is willing to replace the phrase "the entire cost of the audit" in §3.4.2.7 of its proposed Amendment 2 with the phrase "the cost of the independent auditor" as used by the FCC in *TRO* ¶ 627 and as proposed by AT&T.

Finally, AT&T complains that Verizon MA's proposed language unfairly requires the CLEC to pay Verizon MA's expenses within 30 days while allowing Verizon MA, when it must pay the CLEC's audit costs, to have the independent auditor verify the CLEC's costs before making payment. AT&T contends that "reciprocity" requires that verification apply or not apply equally to both parties' bills. *See* AT&T Motion at 16, n. 30. The Department, however, has already found Verizon MA's provisions concerning audit costs "generally to be reasonable." In anticipation of AT&T's contention, the Department further held that:

> The reimbursement deadlines should not be the same because the circumstances are not the same. Verizon's costs of the audit are quickly and easily verified by the CLEC, simply by obtaining that information from the auditor. On the other hand, a CLEC's costs must be compiled and then verified by the auditor to ensure their appropriateness. These tasks take time to complete and to expect Verizon to reimburse a CLEC within 30 days of the auditor's report is unrealistic.

Order, at 132-133. AT&T has offered no reason to reconsider this well-reasoned finding.

CONCLUSION

For the foregoing reasons, the Department should deny the CLECs' motions for reconsideration and clarification.

Respectfully submitted,

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